LIBRARY
SUPREME COURT, U. S.
FILED
AUG 29 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-198

SAMUEL DEWEY YATES,

Petitioner

VS.

THE STATE OF TEXAS

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

WILLIAM LOWE BURKE, JR.
ROBINSON, HANNA, BURKE, LAWYERS
P.O. Box 769
Abilene, Texas 79604
ATTORNEYS FOR PETITIONER

August 30, 1974

QUALITY PRINTING CO., INC. – ABILENE, TEXAS

INDEX

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTION PRESENTED 2

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF FACTS 3

REASONS FOR GRANTING THE WRIT 4

CONCLUSION 6

AUTHORITIES

CONSTITUTION Page

United State Constitution, Amendment VI 2
United States Constitution, Amendment XIV, § 1 3

CASES

Mattox v. United States, 145 U. W., 237 15 S. Court 337, 39 L. Ed. 409 (1895) 6
Pointer v. Texas, 380 U. S. 400, 13 L Ed 2nd 923, 85SCT 106 . . . 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO.

SAMUEL DEWEY YATES,

Petitioner

VS.

THE STATE OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

The petitioner, SAMUEL DEWEY YATES, prays that a writ of certiorari issue to review the opinion and judgment of the Court of Criminal Appeals of Texas rendered May 22, 1974.

OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Texas appears in 509 SW 2d, 600, and is Appendix I hereto. Trial Courts do not render written opinions in Texas.

JURISDICTION

The court of Criminal Appeals of Texas delivered its opinion herein on May 22, 1974. That Court then denied leave to file Appellant's Motion for Rehearing on June 12, 1974, and issued its mandate on June 14, 1974.

The jurisdiction of this Court is invoked under 28 USC, # 1257 (3).

QUESTION PRESENTED

Whether the admission into evidence of taped conversations between the deceased and Appellant, made ten months before the homicide, is a violation of the requirements of the 6th Amendment and the 14th Amendment to the Constitution of the United States of America, as a violation of the Defendant's right to confront the witnesses against him by cross-examination.

Whether the admission into evidence of taped conversations between the deceased and Appellant was fundamental error in violation of the requirements of the 6th Amendment and the 14th Amendment to the Constitution of the United States of America.

CONSTITUTIONAL PROVISION INVOLVED

Amendment 6:

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

Amendment 14:

AMENDMENT XIV–CITIZENSHIP: PRIVILEGES AND IMMUNITIES: DUE PROCESS: EQUAL PROTECTION: APPORTIONMENT OF REPRESENTATION: DISQUALIFICATION OF OFFICERS: PUBLIC DEBT: ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

Petitioner was arrested and charged by indictment with the murder of his wife, Mildred Irene Yates. Trial was before a jury and petitioner was convicted of murder with malice and tenced to life imprisonment.

At the trial of his case, the State was allowed to present into evidence two telephone conversations between petitioner and Mildred Irene Yates, which petitioner had taped ten months before the homicide, during a period when deceased and petitioner were separated and deceased had filed a divorce action against petitioner. Thereafter, the parties were reconciled and deceased and petitioner were living as husband and wife at the time of the homicide.

HOW FEDERAL QUESTION WAS RAISED AND PASSED ON

In the Trial Court, objection to the admission of the taped conversations was made on several grounds and Petitioner raised the question of admission of such evidence as being a violation of the Constitution of the State of Texas and the 6th Amendment and the 14th Amendment of the Constitution of the United

States of America in his Appellate Brief by assignment of error. (Appellant's Brief, pages 2 and pages 7-12.)

In the opinion of the Court of Criminal Appeals, Appellant's argument on error based on the constitutional question was not mentioned.

Petitioner in his Motion for Leave to File Rehearing was based entirely upon the Federal Constitutional Question previously presented, and the Court of Criminal Appeals of the State of Texas denied such Motion without comment.

REASONS FOR GRANTING THE WRIT

The Court below has decided a Federal Question of substance in a way probably not in accord with the applicable decision of this Court.

Petitioner has attached, as Appendix 2, the entire taped conversations as they were admitted in the Trial Court before the jury. At no time either during the trial nor by brief or argument, did the State claim that this testimony was offered for impeachment purposes, but apparently offered the entire conversation as substantive evidence to be used against petitioner.

The District Attorney in his jury argument made the following statements: "I have never heard a deceased person testify as to the circumstances that they were living in at any particular time . . . " (S.F. page 1424), "As I recall her testimony . . . " (S.F. Page 1424); and " . . . from the comments that were made from the very lips of Mildred Irene Yates . . . " (S.F. Page 1430).

The question before this Court is almost identical to the question that was before this Court in *Pointer* vs. *Texas*, 380 U.S. 400, 13L Ed 2nd 923, 85SCT 106, where a transcript given at the examining trial was admitted in the jury trial because the witness had left the State. The Defendant claimed that he was denied the right to confront the witness against him, and this Court held that the 6th Amendments right of the accused to confront the witness against him, is a *fundamental right* essential to the fair trial in a criminal procedure, and a denial of the 14th Amendment guarantee of due process of law. (Emphasis Added). The opinion relies on numerous prior opinions of this Court in reaching its decision.

In *Mattox* vs. *United States*, (1895) 145 U.S., 237 15 S. Court 337, 39 L. Ed. 409, this Honorable Court said that the primary objective of the Constitution provision of due process was to prevent depositions or ex-parte affidavits to be used against the prisoner in lieu of personal examination and cross-examination of the witness in which the accused have an opportunity, not only of testing the recollection and shifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him and judge by his demeanor or upon the stand, a manner in which he gives testimony whether he is worthy of belief.

Pursual of the evidence presented by Mildred Irene Yates makes it evident that she made numerous statements which were inadmissible as hearsay, conclusions, and opinions; and that Samuel Dewey Yates could not be afforded a fair and impartial trial without having an opportunity to question this testimony presented to the jury. Petitioner did not deny that Mildred Irene Yates made the statements contained in the taped conversations, but he did deny the truth of many things which Mildred Irene Yates said.

In *McIntyre* vs. *Reynolds Metal Co.*, 468 F 2d 1092, 5th Circuit, a tape recording was admitted by the trial court and the opinion stated that it was inadmissible as hearsay, as it was: "a statement made out of Court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value on the credibility of the out-of-court asserter. Of course, the fact that the out-of-court statement was presented in Court through a tape recording rather than through another witness's report does not effect its hearsay status. Statements were not made under oath and were not subject to cross-examination on opposing counsel, and the trier of the facts had no opportunity to observe the declarant's demeanor."

The constitutional principal involved here goes beyond the one case concerning the liberty of only one person. Our technology has evolved to such an extent that the taping of conversations is quite frequently done. It is our argument that taped conversations should not be used as primary evidence against anyone wherein the recorded voice is used to give evidence which is taken as facts of the statements made in the tape when the acused has no opportunity to cross-examine the witness against him. He is

thus denied the fundamental right of confrontation to test the statements of the witnesses, which right this Court has zealously protected.

We have attached hereto as Appendix the entire taped conversations as they were admitted to the Jury. This is copied from the Reporter's transcribed Question & Answer Statement of Facts. It is urged that this Honorable Court read this testimony carefully in order to appreciate the many assertions and accusations which "came from the very lips of Mildred Yates." It is impossible, even from a reading of this testimony to fully understand the impact that it had upon the jury. As the local newspaper state, the jury heard "a voice from the grave" and it is obvious that this evidence was presented for the sole purpose of prejudicing the Jury against the accused.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of The Court of Criminal Appeals of Texas.

Respectfully submitted,

William Lowe Burke, Jr.

ROBINSON, HANNA & BURKE
P.O. Box 769
Abilene, Texas 79604

August 27, 1974

CERTIFICATE OF SERVICE

This is to certify that I have mailed true and correct copies to the State's attorneys, Ed Paynter, District Attorney of Taylor County, at the Taylor County Courthouse, Abilene, Texas, 79602 and Jim Vollers, State's Attorney, P.O. Box 12405, Austin, Texas 78711, this 27 day of August, 1974.

William Lowe Burke, Jr.

APPENDIX I

SAMUEL DEWEY YATES, Appellant
NO. 48,163, v. APPEAL FROM TAYLOR COUNTY
THE STATE OF TEXAS, Appellee

OPINION

This is an appeal from a conviction for murder. The jury assessed the punishment at life.

A previous conviction for this homicide was before this Court in Yates v. State, 489 S.W. 2d 620.

The sufficiency of the evidence is not questioned.

The proof shows that the appellant shot his wife some six times with a pistol and killed her. This was after an argument arose about the 17-year-old daughter of the deceased, Carol, coming in late after a date. During the discussion, the deceased became angry when the appellant undressed in front of Carol and the argument became heated. All of the evidence set out in the first opinion will not be repeated.

The appellant testified that he shot the deceased after she said, "I'll kill you," and after she placed her hand on top of a loaded gun in a drawer of a chest of drawers. His confession in which he admitted the shooting was introduced. 1

The court submitted a charge on self-defense.

---

1 The Court Reporter is commended for the excellent manner in which he has prepared the transcription of his notes or the statement of facts. The record is well indexed with the names of the witnesses and the pages of the record noted. A part of the index to exhibits is as follows:

"Exhibits

"State's	Marked,	Offered,	Received	Shown
#30	727	728	729	730-733

First, appellant contends that the court erred in admitting into evidence tape recordings of a conversation that he had with the deceased when they were separated while divorce proceedings were pending. These were offered after appellant had testified, apparently for impeachment. His contention that the proper predicate was not laid is overruled. He testified that he personally taped this conversation with his wife and that the voices were theirs. He contends that the tapes of the conversation were not properly offered or admitted into evidence. When the tapes were played before the jury they were admitted in evidence. See Erwin v. State, 350 S.W. 2nd, 199, and Richardson v. State, 475 S.W. 2d 932. We hold that they are admissible.

The discussion, as recorded upon the tapes, was some ten months prior to the homicide and was about their previous marital difficulties.

Appellant contends that the part of Article 1257a, V.A.P.C., pertaining to the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the homicide, does not apply to something ten months earlier because they were too remote.

In Baker v. State, 368 S.W. 2d 627, the son of the accused was permitted to testify that the accused struck his wife some six years prior to the homicide over the objection that this was too remote. This was held admissible because it showed their previous relationship under Article 1257a. The Court also noted that it was shown that the conduct continued.

"Defendant's
#2 801 802 802 804"

Each page of the record shows the name of the witness and whether it is direct, cross, redirect or recross-examination. The exhibits are included in the record where they have been admitted. The Court appreciates the well prepared and organized 1452 page record. It is time saving and is most beneficial.

The discussion and argument in the present case started over Carol's coming home late. The appellant's testimony showed a continuation of their arguments especially over disciplinary matters concerning her and the children.

Appellant cites Brown v. State, 120 S.W. 444; Hamilton v. State, 201 S.W. 1009, and McAnear v. State, 67 S.W. 117, on the question of remoteness. These were decided before Article 1257a, supra, was enacted. The Brown case supports his position where there had been a complete reconciliation.

In 4 Branch's Ann. P.C. 2d, Section 2224, page 577, it is written:

> "There is a conflict of authority on the question as to whether evidence of threats is admissible where a complete reconciliation has been shown. Powdrill v. State, 69 Crim 340, 155 SW 231 (holding in favor of admissibility of the evidence).
>
> "Contra: Brown v. State, 56 Crim 389, 120 SW 444; Hamilton v. State, 83 Crim 90, 201 SW 1009. Under article 1257a, of the Penal Code, the universal and accepted notions as to what constitutes relevancy have been changed, and in order to show the state of mind and relationship of the parties, evidence of threats should be admissible just as any other fact in the case; and the case of Powdrill v. State, supra, is believed to state the law and the rule which now governs. Upton v. State, 20 SW2d 794; Duke v. State, 147 Crim 533, 182 SW2d 808."

In Duke v. State, supra, it was stated that reconciliation was lightly regarded and a controversial subject in this State.

Powdrill v. State, 155 S.W. 231, held that evidences of former quarrels are admissible into evidence where objections of remoteness and reconciliation were made. There the Court cited Leech v. State, 139 S.W. 1147, 1152, which held that threats are admissible in homicide cases to show malice and motive.

It should be noted that this is not a divorce case, but a murder case.

We hold that remoteness does not apply and that reconciliation, if such be shown, does not apply, and evidence of prior

difficulties was admissible under the general rule of evidence even before the adoption of Article 1257a, supra. See Smith v. State, 502 S.W. 2d 814.

In Brooks v. State, 475 S.W. 2d 268, this Court noted that the Legislature enacted the statute to cover the general rules of evidence already in existence.

Next, appellant contends that reversible error was committed at the punishment stage of the trial during the argument of the district attorney when the following occurred:

"Sam (Appellant) is sitting over there with his hand over his eyes and crying, with his new wedding ring on, or whatever that is.

"Mr. Burke (Appellant's counsel): Pardon me, Your Honor, we object to that allegation. He's not married and he knows that. That's the wedding ring of Mickey Yates when they were married.

"Mr. Paynter (District Attorney): Well, whatever it is.

"Mr. Burke: We object to that, and ask that the jury be instructed to disregard the comment.

"The Court: All right. I will ask the jury to disregard the comment."

A motion for mistrial was overruled.

The argument of the prosecutor should not have been made. In view of the answer of appellant's counsel and the instruction of the court for the jury not to consider the argument, we hold that reversible error is not shown.

Next, complaint is made that the court erred in admitting into evidence State's Exhibit No. 2, a sketch of the trailer house where the homicide occurred, because it was not drawn to scale.

An officer who went to the trailer house shortly after the homicide testified that he made the sketch but not to scale. A second exhibit, apparently drawn to scale, was substituted for the original exhibit. Several witnesses testified, without objec-

tion, that it was accurate.

Even though a drawing is not exact in every detail, an objection goes to its weight rather than its admissibility. Creel v. State, 493 S.W. 2d 814.

There is no showing that the sketch, before it was replaced, was inaccurate so as to be harmful. No error is shown.

Next, the appellant complains that reversible error was committed because the jury was made aware that divorce proceedings had been previously pending between him and his wife. He relies, in part, on the reversal of his prior case by this Court because the divorce petition, supplemental divorce petition and two restraining orders against him were introduced into evidence over proper objections.

We note at the outset that appellant's prior case was reversed because the hearsay statements contained in the papers, which were introduced, were before the jury. Yates v. State, 489 S.W. 2d 620, 621. This Court also reversed the Brooks case because the trial court admitted into evidence the hearsay contained in the temporary restraining order.

In Powdrill, supra, evidence of the wife's divorce and the action of the wife and son in making an affidavit charging him with a violation of the injunction entered in the divorce proceeding in an effort to have him punished was admitted to show motive. Powdrill's first trial, found at 138 S.W. 114, was reversed because the statements contained in the divorce petition were also introduced. The Court held that the allegation of the grounds for divorce and the allegation of the grounds for the injunction, wherein the defendant was charged with cruel treatment and other wrongful acts, were inadmissible. In Powdrill v. State, 155 S.W. 231, the deceased was aiding the wife of the defendant in her divorce suit, and this Court held that, where such facts show motive for the homicide, evidence that such a suit had been instituted and an injunction obtained was admissible, and that an affidavit charging the defendant with violating the injunction could be introduced.

This Court has held that while the actual allegations contained in the court papers themselves may not be admissible, the fact that a divorce had been instituted would be admissible tending to

show feelings and relations of the parties. Clowers v. State, 171 S.W. 2d 143.

Further, the cases relied on by the appellant in support of his contention, Yates v. State, supra; Brooks v. State, supra; Acker v. State, 421 S.W. 2d 398; and Hoyle v. State, 223 S.W. 2d 231, were reversed by this Court because the pleadings and hearsay statements contained in the pleadings and other related court papers from other lawsuits were admitted into evidence over proper objection.

In the instant case, the papers themselves were not introduced, but the oral testimony concerning the marital difficulties between the appellant and his wife was first elicited by appellant's counsel on cross-examination of a State's witness, Dr. Alan L. Staley. It was not until the prosecutor attempted to develop this testimony on re-direct did appellant's counsel enter an objection. And then only to attempt to show that any problems that existed had been reconciled. From this record, their problems had not been reconciled. Dr. Staley testified that in his capacity as marriage counselor one of the main problems existing between the parties was the discipline of the children and in particular the oldest girl, Carol; the same problem which indirectly, if not directly, gave rise to appellant shooting his wife.

Also, the appellant testified without objection that his wife had filed for divorce and about his attempt to reconcile their differences. He further stated that during the pendency of the divorce he had been admonished not to go around his wife so he shot arrows into the trailer house as a way of delivering notes to her. When one testifies to the same thing about which he complains, he has made the error, if any, harmless. No error is shown.

Lastly, the contention that the court overruled appellant's motion to permit him to electronically record the testimony of the witness during the trial is not before us for review, because there is no showing that the motion was presented to the court.

No reversible error has been shown. The judgment is affirmed.

Douglas, Judge

(Delivered May 22, 1974)

APPENDIX II

CLERK'S OFFICE, COURT OF CRIMINAL APPEALS
OF TEXAS
AUSTIN, TEXAS

I, GLENN HAYNES, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 48, 163, styled:

SAMUEL DEWEY YATES,

Appellant

VS.

STATE OF TEXAS,

Appellee

the judgment of the 104th. Judicial District Court of Taylor, County, Texas, was affirmed on May 22, 1974, leave to file appellant's motion for rehearing was denied on June 12, 1974 and on June 14, 1974 the mandate issued.

THEREFORE, with the denying of the leave to file appellant's motion for rehearing, this cause was disposed of by this Court on June 12, 1974, and the appellant having exhausted all remedies in this, the Court of Criminal Appeals of Texas, said judgment has now become final on the docket of this Court.

WITNESS my hand and seal of said Court, at office, in Austin, Texas this 21st. day of June, A. D. 1974.

GLENN HAYNES, Clerk
Court of Criminal Appeals
of Texas

APPENDIX III

(Whereupon, Mr. Paynter turned on the tape player and same started playing, as follows:)

"MILDRED YATES: Morgan Drive Away."

"SAM YATES: It is?"

"MILDRED YATES: Hello!"

"SAM YATES: Hi there, how are you doing?"

Q Now, Mr. Yates, do you recognize the voices on that tape?

A I do.

Q And who is the male voice?

A Mine.

Q And who is the female voice?

A It's either Carol or her mother, one of the two.

MR. PAYNTER: Let's play a little bit more of it.

"MILDRED YATES: I'm all right."

"SAM YATES: Who's on the other phone?"

"MILDRED YATES: They were talking to Sandra a second ago, but she wasn't on the phone but a minute."

"SAM YATES: I have been trying to get a hold of you since 12:00 o'clock. I've got to get out of here. I wanted to talk to you for just a minute before I commit myself for the rest of the weekend."

"MILDRED YATES: Oh!"

Q Now, can you tell the Jury now who the female voice on that telephone conversation is?

A My wife, Mildred Yates.

MR. BURKE: Pardon me, Your Honor, can we have it written or stipulated in the record that this was a conversation that took place during a period of separation?

Q Well, let me ask you. When was this telephone conversation made, Mr. Yates?

A Somewhere between the 24th of July, 1970, and the 30th of July, 1970, when we effected our reconciliation.

Q Now, were you living at home at that time?

A No, I was not.

Q I don't think they could hear you. I barely did.

A I was not.

Q Where were you living at that time?

A Between 9th and 10th Street on Cedar, north side of town.

Q And where was Mildred Yates living?

A She was living in the—at Lot 65, El Tye-O Trailer Ranch.

Q Did Mildred Yates know you were taping this telephone conversation?

A I don't believe so.

Q What was your purpose for taping this telephone conversation?

A She had a habit of agreeing—compromising when she was in a good mood, and then when—at some later date she would

become angry or irritated and she would say, "No, I never said that. I didn't say it that way at all." And these were to refresh my memory as to what she had said. At this time there was some doubt in my mind as to whether I was a little off upstairs, or whether it was she that was generating all these ideas and thinking that we were wrong. We were both at that time going to the—well, three us us, my wife, myself, and my daughter was going to the mental hygiene clinic out at Dyess.

Q Were you looking for some sort of a compromise situation out of these telephone conversations?

A I—when you say compromise, do you mean compromise her, or to compromise—what compromise, what?

Q You used the word compromise a few minutes ago, I thought, Mr. Yates and I wondered what you meant by that?

A I don't believe I did. I said she would change—she would negotiate, let's put it that way, and reason with me when she was in a good mood. When she was not in a good mood, or when she would become angry she was head strong and unreasonable. And at that time she retracted everything, all the gifts that she had given me, all of the confidence she had given me. She would just retract everything.

Q What kind of gifts did she take back from you?

A Well, that tape recorder for one thing. The adding machine that she gave me for a birthday present and the rifle she gave me for a wedding present.

Q She took all those things back?

A To the best of my knowledge she did.

Q What kind of confidences did she take back?

A Well, she would give me her love and trust when she was agreeable, and when she was angry she didn't trust me. She just made me out a heel in general.

MR. PAYNTER: Let's play a little bit more.

(Whereupon, Mr. Paynter turned on the tape player and same started playing, again, as follows:)

"SAM YATES: Anything you got planned this weekend that includes me?"

"MILDRED YATES: I haven't made no plans."

"SAM YATES: Do you want to make some?"

"MILDRED YATES: That's up to you."

"SAM YATES: Well, how's everything been going out that way?"

"MILDRED YATES: All right."

"SAM YATES: Good. Did I get any mail?"

"MILDRED YATES: No, you didn't get any today. You had a letter yesterday of some kind."

"SAM YATES: Who's it from?"

"MILDRED YATES: Henry. H. McGinty, I guess it is. M-c-G-i-n-t-y.

"SAM YATES: Henry H. McGinty?

"MILDRED YATES: Yeah."

"SAM YATES: The name's familiar, but I don't know what it pertains to. What's the address on it?"

"MILDRED YATES: 2233 South 13th Street, Abilene. It's got on the bottom of it date—correction, Reception will be 27 July."

"SAM YATES: Date reception will be 27 July? Well, I don't know what that is. I guess I ought to pick that up and look at it."

"MILDRED YATES: Clay came yesterday."

"SAM YATES: Uh-huh."

"MILDRED YATES: That's all."

"SAM YATES: You bowling tonight?"

"MILDRED YATES: Yeah."

"SAM YATES: Is Clay going to fill in for me?"

"MILDRED YATES: I guess. I ain't talked to him, unless you want to."

"SAM YATES: Well, I'm not going to force him not to by bowling."

"MILDRED YATES: Well, he has done give me notice he had to quit."

"SAM YATES: Well, I gave you notice, too, and I was flat replaced immediately and it hurt my feelings, and I am not going to do Clay that way. I mean, if you have an available substitute standing in back of you, well, hell, don't ask me if I'm going to bowl.

I talked to Billy and Bill awhile yesterday afternoon. I imagine they will be there tonight."

"MILDRED YATES: Oh, they're back?"

"SAM YATES: Yeah. You haven't talked to them yet?"

"MILDRED YATES: No."

"SAM YATES: I had a happy hour with them yesterday afternoon."

"MILDRED YATES: Well, that's nice. I haven't seen them or heard from them. I didn't know they was back or nothing."

"SAM YATES: I kind of expected you to show up out there yesterday afternoon."

"MILDRED YATES: Oh, really!"

"SAM YATES: Yeah."

"MILDRED YATES: Well, I didn't get back from Breckenridge until 5:30."

"SAM YATES: Gracious. How did everything go at Breckenridge?"

"MILDRED YATES: Real great."

"SAM YATES: Good."

"MILDRED YATES: I got a new dealer, but at that Ridgecraft factory up there I shipped a load of frames yesterday and one today from there."

"SAM YATES: Ridgecraft at Breckenridge?"

"MILDRED YATES: Yeah."

"SAM YATES: Well, I was thinking that was another name on that factory at Breckenridge?"

"MILDRED YATES: No, I am talking about the frame factory now."

"SAM YATES: Oh, yeah. Yeah, I know what you are talking about now."

"MILDRED YATES: That old barn where we went."

"SAM YATES: Yeah."

"MILDRED YATES: Okay. I shipped a load of frames out there yesterday and one today."

"SAM YATES: Good. Sounds like business is booming."

"MILDRED YATES: Yeah. I made $81.00 and something yesterday."

"SAM YATES: Good. That's almost worth the trip to Breckenridge, wasn't it?"

"MILDRED YATES: Why sure, I knew my trips to Breckenridge would pay off anyway."

"SAM YATES: There you go."

"MILDRED YATES: Well, if I had a couple of drivers, I could build this terminal into one of the best in Texas."

"SAM YATES: Yeah."

"MILDRED YATES: But I don't have no drivers here."

"SAM YATES: Well, what is he doing about getting you some?"

"MILDRED YATES: Nothing. And everybody that has talked to him about transferring down here he talks out of it."

"SAM YATES: Huh."

"MILDRED YATES: I got on to him the other day and he said, 'Well, we are keeping you covered, aren't we?' I said, "Yeah, up to a point.'"

"SAM YATES: What are you going to do about this short move that you got, lose it?"

"MILDRED YATES: Which one is that?"

"SAM YATES: I don't know. Phyllis mentioned something that you had two on the books; one of them was from one trailer park to another."

"MILDRED YATES: I have had three call in the last two days that are just moving across town."

"SAM YATES: Huh.

"MILDRED YATES: I don't know. Probably miss them."

"SAM YATES: You don't have no plans for the weekend?"

"MILDRED YATES: No."

"SAM YATES: Well, I don't know. Do you want to see me?"

"MILDRED YATES: Well, it is according to how you are going to act."

"SAM YATES: Well, I can't guarantee my actions, shug, because they may be reactions, but I will try my best to be civil."

"MILDRED YATES: Well, if you are going to come out here and preach what we are doing wrong and fuss at me, what we did and didn't do, or all of that, well, I don't want to see you."

"SAM YATES: Well, the question that you asked me before might be unwanted."

"MILDRED YATES: What's that?"

"SAM YATES: Shall I get my loving there, or some place else?"

"MILDRED YATES: What are you talking about?"

"SAM YATES: Well, do you remember Thursday night before I left out there—"

"MILDRED YATES: Yeah."

"SAM YATES: —and you should —was you going to have to get your loving some place else? Well, it has been what, since Tuesday since I have seen you?"

"MILDRED YATES: I don't know. I hadn't give it any thought."

"SAM YATES: No?"

"MILDRED YATES: But you done threatened me with that so you fixed that up."

"SAM YATES: What do you mean threatened you with it?"

"MILDRED YATES: Out there at the hospital the other day."

"SAM YATES: Well, hell, that wasn't no threat."

MR. BURKE: Your Honor, of course, as the Court is aware, and is in the record, we heretofore objected to the introduction to any and all of this as being immaterial and for the other reasons as outlined. In light of the Court's decision to go ahead and allow it to be introduced into

evidence then we also feel as though that in that light and in the interest of justice and fairness that the remainder of this part, at least down through the bottom of what is marked Page 5 on our document—No, pardon me. It would be the fourth sentence of Line 5 on that page, that that should also be introduced to the Jury and let them get the benefit of that.

MR. PAYNTER: I think if we are going to go into that part of the conversation then we ought to go into all of it or none of it, Your Honor. Of course, I want to go into all of it. I don't see how the Court can allow taking part of a conversation and leaving out part that somebody just doesn't happen to like.

MR. BURKE: Your Honor, I have objected to the whole conversation as being contrary to the rules of evidence. Now, the District Attorney, as I understand it, is attempting to not offer one particular part of it.

THE COURT: Well, it was the Court's ruling that he not offer this part.

MR. BURKE: Well, I didn't impose an objection as to that particular part. I imposed an objection to the document in total.

THE COURT: All right.

Then, do you want me to let all of this in here on Page 5 and 6?

MR. BURKE: Judge, we don't want any of it let in, but if the District Attorney is offering this in evidence, then we feel as though the Jury, over our objections, should be entitled to all of it.

THE COURT: I understand your objection, but I have excluded this portion. If you don't want me to exclude this portion under your objection then I'll let it in.

MR. BURKE: All right. As long as I still have my objection to all of this in its entirety.

THE COURT: Yes, sir.

MR. BURKE: All right.

THE COURT: Go ahead with the rest of it.

MR. PAYNTER: I will have to rewind now, Your Honor.

(Whereupon, the tape recording continued, as follows:)

"MILDRED YATES: Then you told your lawyer."

"SAM YATES: Well, hell, a lawyer—well, you wouldn't understand that, not having any relation with a lawyer. The information that you give to a lawyer is private. He cannot reveal it. If he does he is up to a libel suit."

"MILDRED YATES: Well, he told my lawyer. Of course, I denied it."

"SAM YATES: Well, that was the thing to do."

"MILDRED YATES: Well, if you are going to use that kind of stuff against me then I can't go."

"SAM YATES: How would I use it against you?"

Q Now, Mr. Yates, what were you referring to when your wife said, "If you're going to use that kind of stuff against me I can't go?"

A Her visits to my apartment on 10th Street.

Q During the period of separation?

A During the time that she had filed for a divorce.

Q So, were you in effect then occupying the conjugal bed during the pendency of a divorce?

A Yes.

(Whereupon, the tape was backed up and then continued, as follows:)

"SAM YATES: How would I use it against you? Shug, you haven't got ground for divorce anyway."

"MILDRED YATES: Oh, yeah. Incompatibility in this State."

"SAM YATES: What do you mean, incompatibility?"

"MILDRED YATES: Just what I said, that's what I sued you for."

"SAM YATES: Sounds like cruelty to me."

"MILDRED YATES: Incompatibility. You didn't know we had that in this State, did you?"

"SAM YATES: Yeah, I knew. Hell, you don't have to prove anything any more to get a divorce."

"MILDRED YATES: All that says is you can't get along."

"SAM YATES: Yeah. But that divorce papers that you gave me didn't say a damn thing about incompatibility. It did mention that I was extremely cruel and if I wasn't ejected from the house that you was afraid that something drastic would happen, things of this nature."

"MILDRED YATES: Well, that was on your—"

"SAM YATES: Injunction?"

"MILDRED YATES: Uh-huh."

"SAM YATES: Cease and desist

orders?"

"MILDRED YATES: That part is right."

"SAM YATES: Well, then I haven't seen the divorce papers then, have I?"

"MILDRED YATES: Yeah, you got a copy of them. I haven't seen them.

Carol, hand me an ash tray."

"SAM YATES: Another thing I wanted to talk to you about is today is my sister's birthday—"

Q Now, Mr. Yates, when is your sister's birthday?

A The 24th of July.

Q So, if you related that this was your sister's birthday that would have been the 24th of July?

A I believe that statement was that tomorrow's my sister's birthday, was it not?

Q Well, we can rewind it and see.

(Whereupon, that portion of the tape recording was replayed, as follows:)

"SAM YATES: Another thing I wanted to talk to you about is today is my sister's birthday.—"

Q Now, what day would that have been?

A It would have been the 24th of July, 1970.

(Whereupon, the tape recording was continued on, as follows:)

"SAM YATES: —and Phyllis told me that Mike called last night."

"MILDRED YATES: Yeah, he wrote. We knew he was going to."

"SAM YATES: Uh-huh. Do you have any objections to me going ahead and slipping the word to her and tell her that I am to blame for Phyllis not getting to come?"

"MILDRED YATES: No, I don't mind a'tall. I just didn't want to tell any of them because I was afraid it would hurt your folks."

"SAM YATES: I appreciate that. I will break it to her gently and tell her not to mention it to mom and dad for a day or two until we see how things are going, but it is her birthday and I want to say happy birthday to her. So, I will probably call her sometime this evening. I think I can say a few words to her and she can explain to Mike so he will understand it."

"MILDRED YATES: Well, I don't have the money for Phyllis going in the first place. I had planned on taking her babysitting money, but I didn't pay any of the gas bills. I had $53.00 and something worth of them. All of it was gas bills, but I couldn't pay them. I still got to buy rabbit feed, and I've got the car in the garage and I've got about $25.00, and its about eight or nine days until pay day. So, I just—we just won't have the money."

"SAM YATES: Joe hasn't done anything else about his rabbits?"

"MILDRED YATES: No, he hasn't and I am out of feed."

"SAM YATES: Out?"

"MILDRED YATES: Well, I have got enough to last through tomorrow probably."

"SAM YATES: Are you going to try to pick up some tonight or tomorrow?"

"MILDRED YATES: Well I can't get any this weekend. He said yesterday he was going to be out of town."

"SAM YATES: Then, you don't have to go back to *whatchamacallits* over there?"

"MILDRED YATES: Plowman's?"

"SAM YATES: Yeah."

"MILDRED YATES: Well, I hope not. Pete was getting it somewhere. He was supposed to be getting the same brand."

"SAM YATES: I bet you he ain't done a damn thing on it since you haven't heard from him."

"MILDRED YATES: Well, I know he hasn't."

"SAM YATES: Was he pleasant with his conversation the other day?"

"MILDRED YATES: Oh, yeah, other than to tell me what I was doing wrong."

"SAM YATES: What does he say you were doing wrong?"

"MILDRED YATES: Why, putting you out. He had broke up two or three homes before and he knew what that was, and I oughta think a long time before I busted up a home, and this and that and something else. Just like by God I had done it all. Well, it's a funny thing to me that the whole world is against you when you get a divorce."

"SAM YATES: I tried to tell you that, Shug. I didn't want no divorce. I just wanted—"

"MILDRED YATES: I don't want no divorce either. I want a man that appreciates me."

"SAM YATES: Well, I would like a woman that appreciates me, too."

"MILDRED YATES: Man, there ain't any way in hell I could show you any more appreciation than I already have."

"SAM YATES: Yes, you could."

"MILDRED YATES: I've got out and took this job to help you go to school. I got out and did the work out here."

"SAM YATES: Don't give me that stuff about the job was to help me out."

"MILDRED YATES: The hell it wasn't. Now, God damn, it was to supplement your income when the insurance stopped."

"SAM YATES: Shug, I didn't call you to argue with you."

"MILDRED YATES: No, I know you didn't, but you are so damn high and mighty. You are a saint because I divorced you."

"SAM YATES: How do you figure that? I married you because I loved you and I wanted to help you take care of them children."

"MILDRED YATES: Yeah. Well, you sure have a hell of a way showing it."

"SAM YATES: Well, you do, too. I mean, gee whiz, a guy can't even say what he is going to spend his money for and—"

"MILDRED YATES: I don't give

a God damn what you spend your money for."

"SAM YATES: Yeah."

"MILDRED YATES: And that was the one reason that I took a job so I could pay for everything that had to be bought in this household and I didn't have to ask you for your God damn money. You didn't want to put it into this household, you never did."

"SAM YATES: Yes, I did."

"MILDRED YATES: No, you didn't."

"SAM YATES: I haven't spent a penny outside—"

"MILDRED YATES: Then, you had to tell me how I could spend mine besides."

"SAM YATES: No, I didn't never ask you—"

"MILDRED YATES: I have used all of mine and then we used yours, if it was necessary."

"SAM YATES: I didn't ask you for the privilege. There is only six of you and one of me."

"MILDRED YATES: Yeah. Well, you don't marry because you want to save your money."

"SAM YATES: Well,—"

"MILDRED YATES: And I told you at the beginning I had enough, maybe, to pay the bills, but I didn't have enough to feed us and so on. Well, that was fine. You would put your share in and we would make it great."

"SAM YATES: Well, that's for sure."

"MILDRED YATES: Yeah. Well,

you didn't put your share in without fussing about it."

"SAM YATES: The hell I didn't."

"MILDRED YATES: You fight every damn time I had to ask you for a dime of it."

"SAM YATES: Let's not go into all that again, Shug."

"MILDRED YATES: No, because you promised Lieutenant Morgan you wouldn't do this kind of stuff."

"SAM YATES: What kind of stuff?"

"MILDRED YATES: Keep me tore up all the time."

"SAM YATES: Shug, I called to see if we were compatible; if we could get together this weekend; if we could possibly go to the lake and do some fishing, or do something, and you give me what for."

"MILDRED YATES: I haven't given you what for until you started it."

"SAM YATES: I'm sorry."

"MILDRED YATES: Now, if you want to see us and act like you love us and appreciate us, well, that's fine, but if you want to come out here and run us down, or take us off somewhere to fuss at us, well, then, I am not interested. I can't take it the way it is."

"SAM YATES: Well, I am going to let you know that I was hurting. It had been a few days since I had seen you and had anybody. So,—"

"MILDRED YATES: Well, it has been a few days for me, too, and it will probably be a few more. In fact, I am trying to figure out how I can live the rest of my life by myself."

"SAM YATES: Is that really what you want to do?"

"MILDRED YATES: No, it ain't what I want to do, but I ain't going to put up with the likes of you for it because that ain't worth it. Have me and six kids—five kids tore up all the time. Everytime the phone rings, everybody holds their breath."

"SAM YATES: Why?"

"MILDRED YATES: Because you called them liars; you told me lies and caused them to lie, and this and that and something else."

"SAM YATES: Well, Shug, I didn't believe you had any reason in the world for lying Wednesday night."

"MILDRED YATES: I didn't want to talk to you. So, I told Carol to tell you I was gone to the club. She didn't lie to you."

"SAM YATES: Well, she knew that you didn't go to the club. Hell, you took your fishing poles with you, didn't you?"

"MILDRED YATES: Not, I did not."

"SAM YATES: Well, what were you doing fixing fishing tackle when I finally did get ahold of you? What in the hell did she lie to me about whenever I called there and the Nash was home and you wasn't home. Now, you can't tell me that that kid didn't lie, or that you haven't told her to lie for you."

"MILDRED YATES: I didn't tell her to lie. I told her to tell you that I was going to the club."

"SAM YATES: All right. So, that's what she told me, and then, she—"

"MILDRED YATES: All right.

She told you what she knew."

"SAM YATES: She stammered—No, she didn't. She stammered and stuttered there when I asked her who drove the Nash home and then you came on the line."

"MILDRED YATES: Well, she didn't lie to you."

"SAM YATES: Yes, she did. She told me you wasn't there."

"MILDRED YATES: I wasn't here two of the times you called."

"SAM YATES: Well, the third time that I called, you was there and she told me that you wasn't there. I asked her who drove the Nash home and then you came on the line. She bab-bab-bab and I could hear her talking to you in the background.

(Conversation in background.)

"MILDRED YATES: Do you want to give Bottoms your phone number; he is on the other line?"

"SAM YATES: He's got my phone number, I think. Yeah, give him my number."

"MILDRED YATES: Tell him to call 677-9726 and he can reach him."

"SAM YATES: Tell him that I am on the line now and I will probably be here as long as you will talk to me, but we will talk to him in a little bit."

"MILDRED YATES: Tell him he is on the line right now, but he is at home."

"SAM YATES: No, Shug, anything I have done wrong Wednesday night, I mean I called out there to invite you to go to the movie with me. The movie was on

the base and after they told me that you were at the club, I came out to the club. It was almost movie time then and I came by there. I didn't see your car nowhere. I didn't have time to get out and come in and look and see if you were there without your car, but I drove by and I didn't see your car nowhere. So, I went on to the movie. Then, when I got out of there I went to the club you still wasn't there. So, I called home and they was telling me you were out at the club. So, I got a little bit concerned then."

"MILDRED YATES: Well, I left here at 6:30 and I told Carol to tell you I was going to the club."

"SAM YATES: Yeah."

"MILDRED YATES: All right. She didn't lie to you."

"SAM YATES: Well, she knew you wasn't going to the club."

"MILDRED YATES: And I didn't get back from the lake until 10:00, and I called them then and told them where I was."

"SAM YATES: Yeah, I don't suppose Bob and Ann appreciated me calling at 1:00 o'clock, they said they had been home since 10:00."

"MILDRED YATES: Well, that's right. They were probably still up."

"SAM YATES: Well, Ann said she was, but she sounded awfully sleepy."

"MILDRED YATES: Well, did she tell you I went to the lake with them?"

"SAM YATES: Yeah, she confirmed your story with the grunts and huhs and aws."

"MILDRED YATES: Well, why did you have to confirm my story?"

"SAM YATES: Because I had

been lied to so many times before."

"MILDRED YATES: Oh, shit. You wouldn't know it if you was lied to."

"SAM YATES: The hell I wouldn't."

"MILDRED YATES: Sam, I've got a restraining order to keep you from bothering us."

"SAM YATES: Uh-huh."

"MILDRED YATES: Now, I can't have my number unlisted on account of Morgan Drive Away because I still have to use it."

"SAM YATES: Uh-huh."

"MILDRED YATES: But I tell you the next time you come out here and stay all night, or you cause any commotion here at all I'm going to turn you into the law. I am not going to put up with this whole household being tore up all the time."

"SAM YATES: Shug,—"

"MILDRED YATES: Now, I mean that!"

"SAM YATES: I know you do. I am surprised that you didn't exercise that right last Saturday night."

"MILDRED YATES: I should have."

"SAM YATES: But I am going to get out of town this weekend, if we are not compatible. If you and I can't get together and I can't get some loving from you then I am going to—"

"MILDRED YATES: That's all in

the hell you are interested in."

"SAM YATES: No, it ain't. God damn it."

"MILDRED YATES: You think that fixes everything?"

"SAM YATES: No, it doesn't fix everything."

"MILDRED YATES: Sam, what's your plans for the future?"

"SAM YATES: Well, I hope to finish college and get me a responsible job and earn a considerable amount of money between now and the time I am sixty, or sixty-five. I hope I don't even have to draw my Social Security."

"MILDRED YATES: That ain't what I asked you for and you know it."

"SAM YATES: No, I don't. What did you ask for, what my plans for my love life was?"

"MILDRED YATES: Yeah!"

"SAM YATES: Well, when I finish college, if I am not with you then I will probably pack up and go overseas where the money is and where the women are fast and horses are beautiful."

"MILDRED YATES: All right. You don't plan on doing anything towards us getting back together, but you are just going to call out here—"

"SAM YATES: I am doing something. I am doing something right now in trying to get us back together, Shug."

"MILDRED YATES: No, you are not. You are trying to find every dirty thing you can think of to rub me down with.

"SAM YATES: No, I am not."

"MILDRED YATES: Every dirty thing you can think of to rub me down with."

"SAM YATES: No, I am not."

"MILDRED YATES: Calling me a liar and even calling Bob and Ann at 1:00 o'clock in the morning to confirm a statement. The first place—the thing you ought to do is trust me. You told me that every evening as soon as you got back out here at the house you thought it would be a whole lot easier for us to trust each other. Well, you've got to start trusting to start with."

"SAM YATES: Yeah."

"MILDRED YATES: You have got to forget the past, or there will be no future."

"SAM YATES: Oh! Listen who is talking about forgetting the past."

"MILDRED YATES: That's right. And the doctors has told you; the marriage counselors have told you, and everybody else that that's the only way it is going to work; and you agreed with Lieutenant Morgan the other day."

"SAM YATES: Well, Shug, I don't forget—I don't care how much of the past that you forget, your future actions is still going to be judged by what you have learned in the past."

"MILDRED YATES: No, they are not, not if you love somebody."

"SAM YATES: Well, Honey, I ain't—"

"MILDRED YATES: You forget and you start over and you try your best to work the future out."

"SAM YATES: How come you ain't never trusted me?"

"MILDRED YATES: Because God damn you ain't give me no reason to trust you."

"SAM YATES: Well, I haven't given you no reason to distrust me either."

"MILDRED YATES: Oh, yes, you have."

"SAM YATES: Huh."

"MILDRED YATES: Sam, I've got proof of it if I had to go and get that nasty."

"SAM YATES: I am not interested in your proof."

"MILDRED YATES: What?"

"SAM YATES: I am not interested in your proof."

"MILDRED YATES: No, but you are interested in making me out a liar any way you can."

"SAM YATES: No, I would rather make out a lover instead of a liar, Shug."

"MILDRED YATES: All right. Then, why don't you start over and see how much of a guy you can prove you are; how much trust you can put in this family."

"SAM YATES: I intend to."

"MILDRED YATES: How much love you can show."

"SAM YATES: I intend to, but I don't know that it will be in that family or not. It depends on how antagonistic you are and how demanding you are."

"MILDRED YATES: I am not demanding. I'm just telling you where you will have to start, or you ain't got a start."

"SAM YATES: Yeah."

"MILDRED YATES: Now, I postponed that Court hearing Wednesday, but all I got to do is pick up the phone and call them—"

"SAM YATES: Uh-huh."

"MILDRED YATES:—and from sixty days from that date it will be over said and done."

"SAM YATES: Yeah."

"MILDRED YATES: Now, I postponed it simply because I thought you had finally decided to do what was right, because you had promised Lieutenant Morgan that if you come out here it would be working for the future and not fussing about what's going on out here, or what was being done out here, or how anything went this last week, or nothing else."

"SAM YATES: Well, Shug, I am still concerned for you and the children's sake."

"MILDRED YATES: You don't have to be. All you have to be concerned with is the future."

"SAM YATES: Well, I am concerned about a lot of things that don't have to be, I guess. Hang on just a minute and let me get a cigarette. I just run out and searching all over. I will be right back. I had to go all the way to the truck. Are you there?"

"MILDRED YATES: Yeah, I am here."

"SAM YATES: Now, where were we?"

"MILDRED YATES: I don't

know. Where are you going to start?"

"SAM YATES: Is it okay if I come out and get the water skis and—let's see what else was it I though of I needed out there? Aw, there's a couple more items there in that shed that I will probably need if I am going to the lake this weekend."

"MILDRED YATES: Like what?"

"SAM YATES: Life jackets."

"MILDRED YATES: Well, you are not going to take all of it. I bought one pair of those skis on my Sears account I am having to pay it and I think I will keep one pair of them and probably the life jackets."

"SAM YATES: I thought that was a birthday present."

"MILDRED YATES: Well, that's all right. You took back everything that was given to you."

"SAM YATES: I beg your pardon. Now, God damn it if you are going to get that way I will take the movie camera and the projector and—

"MILDRED YATES: No, you won't. You won't touch nothing out here."

"SAM YATES: You are going to be so damn far in debt to lawyers in a little bit you won't know which way is up."

"MILDRED YATES: No, I won't. I got a court order saying you are not to touch nothing out here."

"SAM YATES: No, you got a court order that says I am not supposed to disturb the peace out there."

"MILDRED YATES: And touch anything in this trailer house or belongs out here. You better read it again."

"SAM YATES: I did have some personal possessions left out there, Shug."

"MILDRED YATES: Oh, sure!"

"SAM YATES: And I do intend to get them if we are not going to—"

"MILDRED YATES: All right."

"SAM YATES:—if we are not going to be compatible."

"MILDRED YATES: All right. You can have what belongs to you when the Court says you can have them. Now, if you want to be decent about this, I will give you what I think you ought to have now, but if you are just going to keep on and on about the past—"

"SAM YATES: I am not asking—"

"MILDRED YATES:—and this and that and not plan for the future like you said you'd do—"

"SAM YATES: All I ask you was could I come out and pick up my birthday present, the water skis and life jackets so I can go boating this weekend."

"MILDRED YATES: You can't leave one pair here, huh?"

"SAM YATES: No. One pair I had when we got married and the other pair you gave me for a Christmas—for a birthday present."

"MILDRED YATES: No, it wasn't a birthday present."

"SAM YATES: I am going to leave the pair there that I gave to Linda."

"MILDRED YATES: Oh, that's

nice of you."

"SAM YATES: And my question was: Can I pick them up this afternoon? Are you still with me?"

"MILDRED YATES: Yes, I am still here. What about all these plans for the weekend?"

"SAM YATES: Well, I haven't made nothing definite. I just wanted to know if you would include me in anything, of if you wanted to see me? I told you that—"

"MILDRED YATES: Well, tell me your plans and I will see if they are acceptable?"

"SAM YATES: I don't have any, Shug. I called you to—well, I mentioned to Phyllis earlier that I planned on going to Brownwood, or to Cisco, or to Oak Creek, or one of these places around here and get right out in the middle of the lake and throw my line out in the water and rear back and study some law. I got two tests Tuesday."

"MILDRED YATES: Well, that wasn't including us."

"SAM YATES: Well, how in the hell can I include you when I can't find you most of the time?"

"MILDRED YATES: I haven't been anywhere."

"SAM YATES: Come on, Shug. Wednesday night?"

"MILDRED YATES: I went fishing."

"SAM YATES: But you was at the club Wednesday night before you went to the church and you was at the V.F.W."

"MILDRED YATES: That's

right."

"SAM YATES: Uh-huh."

"MILDRED YATES: Ain't no law says I have to stay here all the time."

"SAM YATES: You're right."

"MILDRED YATES: Ain't no law says I can't get out and go some place if I want to either."

"SAM YATES: Well, this is true, too."

"MILDRED YATES: And there ain't no law that says I have to answer to you for every one of my actions either."

"SAM YATES: This is true, too."

"MILDRED YATES: All right. Then, why do I have to do it?"

"SAM YATES: You don't. If you don't want to do it forget it. I called you to try to be compatible and I wanted to see you—"

"MILDRED YATES: All right. I asked you for your plans."

"SAM YATES: All right. And I wanted to get together and make some plans. If I can't make some plans with you then I am going to make some with somebody else."

"MILDRED YATES: I don't care."

"SAM YATES: Well, all right."

"MILDRED YATES: How do you like that?"

"SAM YATES: That's fine."

"MILDRED YATES: Now, if you want to come out here I will talk to you, but if you get out of line one time I am going to call the law."

"SAM YATES: Well, now, I ain't coming out there under a threat."

"MILDRED YATES: That's right. That's the way it is going to stand."

"SAM YATES: Ain't no way that I can come out there or even talk to you on the phone without you getting huffy about something."

"MILDRED YATES: Sam, you think you have got me over a barrel and you are wrong."

"SAM YATES: I don't want you over a barrel; I want you in bed."

"MILDRED YATES: Oh, shit, that's the only place you ever think about. If we would stay there twenty-four hours a day we would be all right, wouldn't we?"

"SAM YATES: I guess."

"MILDRED YATES: Well, you are full of shit. That ain't all there is to marriage."

"SAM YATES: Well, it's seventy-five percent, remember?"

"MILDRED YATES: Okay, but you won't give the other twenty-five."

"SAM YATES: Ha!"

"MILDRED YATES: You think you are Mr. King it. Until you can accept the fact that I have tried everything I have done to help get you through school so one day—"

"SAM YATES: Oh, bull corn."

"MILDRED YATES:—you could say, 'Honey, I will make it up to you whenever I get out of this mess and get a job you won't have to work—"

"SAM YATES: I told you—"

"MILDRED YATES:—'You won't have to get out here and hoe the garden; you won't have to move rabbit manure. I'll do that. I will mow the lawn. I will do this and that. I'll make it up to you, Honey.' Cause there ain't another woman in the world that will do what I have done for you."

"SAM YATES: You are full of crap, too."

"MILDRED YATES: No, I am not either. I know the women."

"SAM YATES: I do admit you are pretty important or I wouldn't even still be trying."

"MILDRED YATES: You are not trying, Sam."

"SAM YATES: Yes, I am."

"MILDRED YATES: If you was trying you would forget the past and you would start out working out that future of what you said you was going to do."

"SAM YATES: All right, I have started."

"MILDRED YATES: What have you done?"

"SAM YATES: I have listed the things that I want you to do and I would agree to go back with you on."

"MILDRED YATES: Uh-huh."

"SAM YATES: And I am very interested in seeing what the kids think about the rules and so forth that I have laid down—"

"MILDRED YATES: All right."

"SAM YATES:—and see how they're coming along with what they are doing."

"MILDRED YATES: All right."

"SAM YATES: I feel that most of the complaints there is with them. When they tell me what rule they don't like then I can say, well, children it is this, this and this. So, actually, there is only two rules that I know of; one is to give twenty-four hour notice and the rest of them is to do the best job you know how to do of whatever you start to do."

"MILDRED YATES: And all of your complaints is with the kids?"

"SAM YATES: No. The fact that I didn't have a say-so in the management of the family or the money is the reason that I left there. Shug."

"MILDRED YATES: I gave you those and you threw them out the window."

"SAM YATES: No, I didn't."

"MILDRED YATES: You stomped them in the mud."

"SAM YATES: No, I didn't."

"MILDRED YATES: Yes, you did."

"SAM YATES: The kids were wetting the bed and didn't have no privileges and I was the drill sergeant and, well, this and that and something else. So, I didn't have much of an opportunity, really."

"MILDRED YATES: Oh, you

didn't. You even told Lieutenant Morgan you put twenty-four hours a day at school and you didn't have time to listen to their silly arguments or gripes. You didn't have time to listen to me."

"SAM YATES: No, two or three hours a day and then at night when I went to bed to love you, your face was all swelled up from crying and this and that and the other."

"MILDRED YATES: And whose damn fault was that?"

"SAM YATES: Well, probably mine. Blame me for everything. I've got broad shoulders."

"MILDRED YATES: Well, if you did, you would be making some plans to take me dancing and take me out and do the things that I enjoy and to take—"

(Changed sides of tape on tape player.)

"MILDRED YATES: That I want you back?"

"SAM YATES: Uh-huh."

"MILDRED YATES: Under what conditions?"

"SAM YATES: Well, start over by maybe your terms."

"MILDRED YATES: Well, I got them down here."

"SAM YATES: Well, let's have them."

"MILDRED YATES: No, I think we ought to discuss them, personally, you are holding up my business phone."

"SAM YATES: Well, my question was: Can I come out and get my skis and talk over the plans with you?"

"MILDRED YATES: You can come out and get one pair for the time being."

"SAM YATES: I ain't coming."

"MILDRED YATES: Okay."

"CAROL YATES: Yates' residence."

"SAM YATES: It is?"

"CAROL YATES: Uh-huh."

"SAM YATES: Let me talk to Mama."

"CAROL YATES: Just a minute."

"MILDRED YATES: Hello."

"SAM YATES: Hi, there, have you cooled down some?"

"MILDRED YATES: I don't know."

"SAM YATES: I decided I would take that one pair of skis."

"MILDRED YATES: Okay."

"SAM YATES: Can I come and

get them?"

"MILDRED YATES: Yeah. I was fixing to run get the boys a hair cut real quick, but I guess you can come and get them."

"SAM YATES: Well, I don't know where we are going to get them a hair cut."

"MILDRED YATES: At the club."

"SAM YATES: It is closed. The barber shop closes at 5:00 o'clock."

"MILDRED YATES: It closes at 5:30, don't it?"

"SAM YATES: Oh, may be.May-be you are right; I don't know."

"MILDRED YATES: Carol, check and see if the barber shop has already closed out there, 29540."

"SAM YATES: Do you want to see me at all this weekend?"

"MILDRED YATES: Yeah, if you are going to act all right."

"SAM YATES: Like I said, Shug, why I act and react to your actions. I will be nice if you will be nice."

"MILDRED YATES: Aw, they have already closed. I was goofing anyway."

"SAM YATES: Well, I will be out there in a little bit to pick up those skis and my mail."

"MILDRED YATES: Okay."

"SAM YATES: Okay, we will see you."

"MILDRED YATES: Bye, bye."

"SAM YATES: Bye, now."

(Phone rings)

"CAROL YATES: Yates residence."

"SAM YATES: It is?"

"CAROL YATES: Uh-huh."

"SAM YATES: How's everything out that way?"

"CAROL YATES: Okay."

"SAM YATES: Is Mama around?"

"CAROL YATES: Yeah, she's eating lunch right now."

"SAM YATES: Oh, she is?"

"CAROL YATES: Uh-huh, we all are."

"SAM YATES: Oh, what are you having for lunch?"

"CAROL YATES: Oh, hamburgers and junk to go with it."

"SAM YATES: Ask her if she got time to talk to me, or would she like for me to call back a little later after she finishes her eating."

CAROL YATES: Okay. Hold on."

"SAM YATES: Sunday, July 26th, 1970. Another attempt to talk reasoning to Mickey and to patch up our lovers' quarrel and to effect a reconciliation of some type."

"MILDRED YATES: Hello."

"SAM YATES: Hi, there. What are you up to?"

"MILDRED YATES: Eating."

"SAM YATES: Eating? Feeding your face?"

"MILDRED YATES: Yes, I'm trying to."

"SAM YATES: How's everything out that way?"

"MILDRED YATES: Okay."

"SAM YATES: Good. What time did you leave here last night?"

"MILDRED YATES: 12:00 o' clock, or a little before."

"SAM YATES: Good gracious."

"MILDRED YATES: Well, you go to sleep. I can't get you awake."

"SAM YATES: Yeah."

"MILDRED YATES: That's no fun."

"SAM YATES: I know what you mean."

"MILDRED YATES: You were

really in a bad way."

"SAM YATES: I was?"

"MILDRED YATES: Yes."

"SAM YATES: How's that?"

"MILDRED YATES: Well, you didn't perform."

"SAM YATES: I didn't?"

"MILDRED YATES: You didn't."

"SAM YATES: I'm sure I did."

"MILDRED YATES: You are going to have to lay off that booze or something.)

"SAM YATES: Yeah, I was drinking to heavy yesterday. I slept all day today. I have just been out of bed a little while and came in and started to fix me a bite to eat. My milk is clabbered. So, I put on a chicken pot pie and got to wait another thirty or forty minutes before it will even be ready to eat."

"MILDRED YATES: How come your milk spoiled?"

"SAM YATES: Well, that's milk that I bought two weeks ago—two weeks ago yesterday, and I guess two weeks is just a little bit too long. I didn't get through—I bought two half gallons, originally, and I had, oh, about three-fourths of a half gallon left in one and I poured in out on my cereal here while ago and it was clabbered. So, I just gave it to the dogs. It didn't taste real bad, you know, but it didn't taste too good either. So, I gave it to the dogs. Anybody go to church this morning?"

"MILDRED YATES: Yeah, the girls did."

"SAM YATES: You didn't go?"

"MILDRED YATES: No."

"SAM YATES: The boys didn't go?"

"MILDRED YATES: No, they didn't want to go, and I ain't going to force them to. When they wanted to go they couldn't and now they have lost interest."

"SAM YATES: Huh."

"MILDRED YATES: The phone is out of order in the kitchen."

"SAM YATES: Oh, it is?"

"MILDRED YATES: It don't ring or nothing up there."

"SAM YATES: What's the matter, did the dogs chew that guide wire in two again?"

"MILDRED YATES: Oh, I imagine. I guess you are real busy in studying, huh?"

"SAM YATES: Well, I have got to do some studying this afternoon. I just went over these papers from the NCOA here that I am supposed to fill out and I am going to try to get them off tomorrow and become an insurance agent, I guess. Charles seemed to think I could do pretty good with it and I'm going to give it a whirl. If I can make a little bit while I am finishing up this schooling it would sure help. Of course, I can't spend all of my time talking to people about the NCOA. What time did you get over last night?"

"MILDRED YATES: About 11:00."

"SAM YATES: And left at 12:00?"

"MILDRED YATES: Yeah."

"SAM YATES: Good gracious."

"MILDRED YATES: Well, I couldn't get you awake. I didn't leave the house until about twenty-five 'till."

"SAM YATES: Twenty-five until 11:00?"

"MILDRED YATES: Yes."

"SAM YATES: Well, I am sorry I was in such a condition yesterday and will try not to let that happen again."

"MILDRED YATES: Well, I don't want any more of it. If drinks affected me that bad I wouldn't ever touch it."

"SAM YATES: Well, did I do something terrible?"

"MILDRED YATES: No, but trying to make an impression that don't make it."

"SAM YATES: Trying to make an impression?"

"MILDRED YATES: Yes."

"SAM YATES: Who was I trying to impress?"

"MILDRED YATES: Well, me, I thought."

"SAM YATES: With what?"

"MILDRED YATES: Well, Sam, if you don't know, I sure don't. Maybe I was imagining things."

"SAM YATES: I don't know what you are talking about, Shug, could you give me some idea and maybe I will remember it."

"MILDRED YATES: Well, I thought you were trying to make an impression on me as to getting back together and all."

"SAM YATES: Well, I have always tried that. Always interested in that, Shug."

"MILDRED YATES: Well, that is what I say—drinking that much and going to sleep ain't doing no good."

"SAM YATES: Yeah."

"MILDRED YATES: I said a long time ago if I couldn't keep you awake there wasn't much to it, was there?"

"SAM YATES: Well, it's a little bit different when you are all tore up and separated."

"MILDRED YATES: Well, I couldn't keep you awake then and I can't now either."

"SAM YATES: I didn't do anything out of the way, did I? It was Saturday night and I was home in bed with my wife. I guess everything was all right then, except that you were disappointed, huh?"

"MILDRED YATES: Well, you don't leave a very good impression when you can't keep somebody awake."

"SAM YATES: I'm sorry, Shug. I satisfied you, didn't I?"

"MILDRED YATES: Oh, yeah."

"SAM YATES: That's the important thing."

"MILDRED YATES: Oh, it's got to be more than that, Sam."

"SAM YATES: There is more."

"MILDRED YATES: Well, I can't get you say anything about it."

"SAM YATES: I love you."

"MILDRED YATES: Not enough."

SAM YATES: I am afraid, Shug, that you will always not love as you get."

"MILDRED YATES: No, I don't."

"SAM YATES: Well, I don't believe there is anybody that could love you any more than I do."

"MILDRED YATES: Well, you started out pretty good yesterday. I sure had hopes, the first good hopes I had had in six months."

"SAM YATES: Where did I stray?"

"MILDRED YATES: I guess by not carrying on through, I don't know. You told me that you would even be willing to give up college, if that were what it was, and I said, I wouldn't expect you to do that, but I did appreciate the offer."

"SAM YATES: Well, that's true, Shug, if I don't have you and them kids to work for, hell I got enough education. I got almost enough income that I could just

loaf, if I wanted to. I could just wander around and get on board a military airplane and go anywhere in the world I wanted to. Just travel around if I wanted to, or I could spend all of my time on the ocean, if I wanted to. Pretty well got it made, Shug. Like I say, if I can just get through this college maybe I will be able to support you and them kids of what I would like you become accustomed to, you know. I have got to have somebody to inspire me to do my best. I am sure my poor performance yesterday was partly because of the fact that I was unhappy."

"MILDRED YATES: Yeah, but what is happiness—"

"SAM YATES: Happiness is worth everything."

"MILDRED YATES: Well, you already gave yourself something that I can't give you. As I told you yesterday evening, you had to earn it. You've got the kids where they are afraid of you because you kick me around. You grabbed the gun every time you get mad and do things like that until they are frightened for you to even come out here."

"SAM YATES: Don't you realize that you are an alarmist. You have put that fear in them. That they come off over there to what-you-call-it that night?"

"MILDRED YATES: Sam, I have five children that is afraid to stay in this house. Now, do you think I am going to let them stay when I know none of them are going to sleep or nothing else?"

"SAM YATES: Well, you save that; okay? Do you remember what led up to that threat?"

"MILDRED YATES: Nothing."

"SAM YATES: It did, too."

"MILDRED YATES: I tried to get you to go with me.

"SAM YATES: Go with you where?"

"MILDRED YATES: That evening I went out."

"SAM YATES: Well, that's neither here nor there. Shug. I had to work to do that evening."

"MILDRED YATES: Sure, you had twenty-four hours of schooling when you were out here and you didn't have the time for none of us."

"SAM YATES: Well, one reason for that is there is so many interruptions."

"MILDRED YATES: There didn't have to be."

"SAM YATES: No, there didn't have to be, but that is the way it was."

"MILDRED YATES: That's the way you took it and that's the way you did it. You put twenty-four hours of schooling ahead of everything in the house—"

SAM YATES: Oh, I wouldn't say that."

"MILDRED YATES:—and then when interruptions came up then you were mad at the world."

"SAM YATES: No, I wasn't mad at the world."

"MILDRED YATES: Sam, I can't live like that and I can't expect my children to. The first year we were happy; we got out and done things together. We went as a family. We'd hunt and shoot bow and arrows together; we went to the lake; we taught gun safety to all members of the family and each of us tried it occasionally and we went hunting with our friends and got them over for dinner and we enjoyed life. The last

two and a half years we have become hermits over here and tried to stay out of everybody's way and made people feel unwelcome and they got to where they wouldn't come and we haven't been anywhere or done anyting until it is just like a prison."

"SAM YATES: Shug, I'm sorry and if you want me to then I'll just stay away until I finish this schooling, but you know it is going to change then."

"MILDRED YATES: How is it going to change then?"

"SAM YATES: Well, I will be a different person. I won't have to study twenty-four hours a day as you put it. The way I am over here I get by on about two or three hours studying a day."

"MILDRED YATES: Why couldn't you do that at home?"

"SAM YATES: Because there is too much to be done. Too much counseling the family and so forth. I come in and listening to everything you had done in the trucking business and usually—"

"MILDRED YATES: You are supposed to be interested—"

"SAM YATES:—and usually sitting around talking to a truck driver the rest of the day, or part of the day."

"MILDRED YATES: You are supposed to be interested in all of that."

"SAM YATES: I am interested in it, Shug."

"MILDRED YATES: You shouldn't have never, never put our needs—your needs ahead of ours."

"SAM YATES: I haven't."

"MILDRED YATES: You have."

"SAM YATES: That is what I tried to tell you last night. Hell, I would give it all up for you, if that is what you want, but I have got to think these things through. I have got to see them through. I can't do like you and just pursue a course one day and the next day change directions and go some other direction."

"MILDRED YATES: That is what you have been doing the last two years."

"SAM YATES: No, it ain't either."

"MILDRED YATES: Yes, it is."

"SAM YATES: There is still purpose and direction to my life."

"MILDRED YATES: Yesterday was the first time you had given me any hope in six months."

"SAM YATES: Oh, come on, Honey."

"MILDRED YATES: That's right. I told these children I had the first real hope—that I felt better yesterday than I had in six months."

"SAM YATES: I'm sorry I spoiled it for you by not being able to perform last night."

"MILDRED YATES: It wasn't spoiled completely, Sam, I am not that disappointed yet. It is just according to what you do in the future. I had company today."

"SAM YATES: Who?"

"MILDRED YATES: Ann and her mother come with Mrs. Patterson and come by and stayed a couple of hours with us and invited us over, me and the kids."

"SAM YATES: How did your

bowling go Friday night?"

"MILDRED YATES: Terrible. Lost four. Are you going to bowl this Friday?"

"SAM YATES: Is Clay going to be there?"

"MILDRED YATES: No."

"SAM YATES: I imagine I will then, Shug."

"MILDRED YATES: Well, can I count on you?"

"SAM YATES: You can always count on me. I have backed you up every night and Friday night included."

"MILDRED YATES: You backed me up Friday night?"

"SAM YATES: Yeah. If Clay hadn't been there, I would have been there."

"MILDRED YATES: Still worrying about me, huh?"

"SAM YATES: Yeah, I don't want to embarass you, or cause you any problem there at all. How many more nights you got?"

"MILDRED YATES: Seven."

"SAM YATES: Seven."

"MILDRED YATES: Well, I got to start the winter league the very next week."

"SAM YATES: Are you going to get in on it, too?"

"MILDRED YATES: I am secretary of it."

"SAM YATES: That's nice."

"MILDRED YATES: I was voted secretary of it last night. It's a pretty good honor."

"SAM YATES: Well, I will bowl with you next Friday night, Shug. I hope that you have learned from this experience that you don't be too hasty to replace me. Sure it was wrong for me to give you—to put you on two weeks notice, but I do feel like if we went through with the divorce then I wouldn't want to see you every Friday night, but that there would be some Friday nights that I would want to see somebody else, you know, and I really couldn't afford to bowl."

"MILDRED YATES: Well, I haven't said that I am not going through with the divorce yet."

"SAM YATES: Well,—"

"MILDRED YATES: All I have done is postpone it a little, Sam. I am trying to give you a chance."

"SAM YATES: I am trying to take that chance and give you one."

"MILDRED YATES: But now I can't come down there every night just to give you some sex and forget it; that's out."

"SAM YATES: I didn't forget it. Here I have called you today to see how everything was and thank you for telling me—taking the time to talk to me."

"MILDRED YATES: And like I tried to tell you last night that ain't the only thing that there is, but there has got to be some more. There has got to be some planning for the future, ideas and all, or it just ain't going to be, now."

"SAM YATES: Well, I understand that, Shug."

"MILDRED YATES: My coming down there ain't getting us nowhere."

"SAM YATES: Well,—"

"MILDRED YATES: Because that is all you want to discuss is the sex end of it."

"SAM YATES: No, it isn't. No, it isn't. I talked to you awhile yesterday at the club and then I cam on up there and talked to you awhile yesterday afternoon and then I came over here and waited for you. I talked to you after you got here. Surely I was tired and exhausted last night on top of having a few too many to drink, but if I was eating regular, sleeping regular, yesterday would have been no problem."

"MILDRED YATES: Well, I am doing the same thing you are. I don't sleep or eat at all."

"SAM YATES: Then, when there ain't something handy to eat I usually grab a drink instead and that's no good, Shug."

"MILDRED YATES: Sam, it is not my fault, not all of it."

"SAM YATES: I know it is not all your fault. It is not all of anybody's fault."

"MILDRED YATES: All right. Do you see any reason at all for this. Can you see it all how bad it had gotten with us, I mean, as a whole family?"

"SAM YATES: Yeah."

"MILDRED YATES: We have seen Dr. Staley and we have already seen Lieutenant Morgan. We weren't getting anywhere. We were getting worse and worse and worse."

"SAM YATES: Well, I don't think

we have got worse, Shug."

"MILDRED YATES: No, the last couple of days it has improved a little bit, but I am talking about up to that point."

"SAM YATES: Well,—"

"MILDRED YATES: I think it took this to make you realize that there was something really wrong."

"SAM YATES: Well, if you hadn't deviated from my guidance, if you hadn't been contrary to what I asked you to do, then none of this would have ever happened, Shug."

"MILDRED YATES: Sam, I am not."

"SAM YATES: Well, go back to the childrens' incident when I tried to ask you or direct you how the children should behave, or something of this nature, and you were just to the opposite of it, then, I told you when we started to separate, you said there was no such thing as a legal separation. I said, 'Well, whether it is legal or not just drop that word legal. There ain't nobody can tell us what to do and what not to do. Whether to live together or we are not to live together."

"MILDRED YATES: All right, Sam. Without that restraining order I would have had you out here every day."

"SAM YATES: No, you wouldn't Shug."

"MILDRED YATES: I have had you out there every day anyway, except about two."

"SAM YATES: No."

"MILDRED YATES: And I have had you out here demanding this right and that right and

without that restraining order we would have already had a knock down and drag out or two."

"SAM YATES: No, we wouldn't. You are—"

"MILDRED YATES: Yeah, we would have because we got that far already. I don't intend to live with a man that is gonna hit me. He is not no man if he hits a woman."

"SAM YATES: Well, Shug, the only time I ever hit you was when you got in the way and got hysterical and started pawing at me, or—"

"MILDRED YATES: I got hysterical and got in the way. What kind of person does this kind of thing, Sam?"

"SAM YATES: Well, even a rat will fight if he is cornered."

"MILDRED YATES: Oh, don't be funny."

"SAM YATES: That's right."

"MILDRED YATES: You better go see what a man is."

"SAM YATES: I know what a man is."

"MILDRED YATES: Well, he damn sure ain't one that hits women."

"SAM YATES: If she has got him cornered in her bedroom and—"

"MILDRED YATES: I was sitting in the bed."

"SAM YATES: All I did was come out of the bed—"

"MILDRED YATES: Yeah. How come Carol got hit in the process."

"SAM YATES: Oh, God, don't tell me Carol got hit."

"MILDRED YATES: Yes, she did."

"SAM YATES: Where?"

"MILDRED YATES: On the head, the same as I did."

"SAM YATES: Oh, my goodness."

"MILDRED YATES: Well, Sam, this is no good. You can't admit to anything."

"SAM YATES: Shug,—"

"MILDRED YATES: And it ain't gonna work until you realize that these things are happening."

"SAM YATES: Carol was on the phone; how did she get hit?"

"MILDRED YATES: She got hit because she was trying to hold you off of me. Phyllis is the one that called the police."

"SAM YATES: Oh, come on. Somebody has got your facts distorted, Shug. Now, Phil was in the kitchen on the phone and Phyllis came in there trying to grab a hold of me—"

"MILDRED YATES: That was after I run you out of the bedroom."

"SAM YATES: You didn't run me nowhere. You ain't big enough, Shug. Why did you have three people holding me and nobody was holding me they were both on

the phone. Shug, I didn't call to argue with you. Honey, I love you. I love them kids. I wouldn't hit them and beat on them like you are saying that I have done."

"MILDRED YATES: Sam, you are making yourself smaller all the time. Yesterday you acted like a man. For a few minutes—there ain't no need for us talking or seeing each other or nothing."

"SAM YATES: Now, Honey, don't feel that way."

"MILDRED YATES: I do, Sam. Now, I am just going to refuse to talk to you about anything else because one day you say one thing and the next day you change it. Now, that's no good. One day you are willing to give up anything to try to straighten things out and ten minutes later you are calling me a liar about everything that is said."

"SAM YATES: I haven't called you a liar, Shug. All I said was you are mistaken."

"MILDRED YATES: Got the facts distorted. That's the same thing."

"SAM YATES: No, it's not."

"MILDRED YATES: Sam, why can't you be civil two days in a row?"

"SAM YATES: I can. And I am trying my best to be civil to you today. I am awful lonely and I got work to do; and I got to study and I would like to see you later on today."

"MILDRED YATES: I'm awful lonely too, but I am lonely for a person that needs me and needs me like I am; and is not trying to change me and five childrens' lives."

"SAM YATES: I am not trying to change you."

"MILDRED YATES: Oh, yes, you

are. You forgot that I am forty-one and I have got children almost eighteen years old that is about the best kids in the damn world and that they didn't get that way all by themselves."

"SAM YATES: No, I am sure somebody had to influence their lives."

"MILDRED YATES: Well, who do you suppose that was?"

"SAM YATES: I imagine it was you. Everytime I tried to claim a little credit for it you chopped me down."

"MILDRED YATES: You can have credit. You could have plenty of credit, but you don't go around bragging about it and poking it down people's throat. You made a big impression yesterday and last night you even had the kids falling after you, and you turn around today and spoil it all."

"SAM YATES: How did I spoil it today, Shug?"

"MILDRED YATES: You didn't do these things. You are are angel."

"SAM YATES: I am sorry, Shug. I am sorry you got upset."

"MILDRED YATES: You were willing to give up college or everything else for this family a minute ago."

"SAM YATES: I was and I am. I haven't changed my mind a bit."

"MILDRED YATES: But you gotta have it your way. You are the one that is always right. I am the fool in this case."

"SAM YATES: Shug.—"

"MILDRED YATES: Sam, there

ain't no use. I'm butting my head against a stone wall."

"SAM YATES: No, you are not, Shug."

"MILDRED YATES: Why do you change from one day to the next?"

"SAM YATES: I don't, Shug. It's your mind that changes about me."

"MILDRED YATES: No, it isn't. You have just sit here and told me that nothing I have said was true that you didn't do these kind of things."

"SAM YATES: I didn't say that nothing that you said was true. I told you that you were an alarmist and I told you that—"

"MILDRED YATES: All right. You married me that way. I haven't changed. You knew I was a born worrier and a cry baby besides."

"SAM YATES: You used to give me credit for having common sense, but now then you don't."

"MILDRED YATES: You have lost your common sense in getting smart with college."

"SAM YATES: No, I don't think so."

"MILDRED YATES: Yes, you have. Ask your friends."

"SAM YATES: Well, don't you think I will be a normal person whevener I get through with all of this studying?"

"MILDRED YATES: Sam, I have made excuses for you until there isn't any. I've pleaded with these kids to please walk the line, don't ever upset him. It will get better. He' taking a test right now. He is worried about this; he is

worried about that. I have made excuses until there isn't any more. Until I can't see any future."

"SAM YATES: Shug, have you been taking your nerve pills?"

"MILDRED YATES: No, I am not taking my nerve pills. Why should I?"

"SAM YATES: Because they are supposed to keep you from getting the wrong slant or being—"

"MILDRED YATES: Sure."

"SAM YATES: If somebody calls you and tells you how much they love you and how much they have give up for you and so forth—"

"MILDRED YATES: And on the other hand called them a liar and got to change everyway you want."

"SAM YATES: Good God, Honey. I didn't call you a liar."

Q That portrayal there that you heard played is that conversations that were between you and your wife, Mildred Yates, all those conversations?

A It was.

SUBJECT INDEX

Page

OPINION BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISIONS INVOLVED . . 2

STATEMENT OF THE CASE 2

ARGUMENT AND AUTHORITIES 3

1. Clearly the tapes contained evidence admissible in this case 3

2. The admission into evidence of taped conversations between Petitioner and deceased was not a violation of Petitioner's Sixth Amendment right to confrontation and cross-examination . . 6

3. Whatever objection Petitioner had based on constitutional grounds was waived by his failure to raise it in the trial court 8

CONCLUSION 9

PROOF OF SERVICE 10

INDEX OF AUTHORITIES

CASES — Page

Barber v. Page, 390 U.S. 719 (1968) 6

Brown & Root v. Haddad, 180 S.W.2d 339 (Tex.Sup. 1944) 8

California v. Green, 399 U.S. 149 (1970) 6

Delaney v. United States, 263 U.S. 586 (1924) 7

Eubanks v. Winn, 469 S.W. 2d 292, (Tex.Civ.App. writ ref. nre. 1970) 8

Henry v. Mississippi, 379 U.S. 443 (1965) 8

Mattox v. United States, 156 U.S. 237 (1895) 7

Pointer v. Texas, 380 U.S. 400 (1965) 6

Reed v. Beto, 343 F.2d 723 (5th Cir. 1965) 7

Texas General Indemnity Co. v. Scott, 253 S.W.2d 651 (Tex.Sup. 1953) 4,5

United States v. Lipscomb, 435 F.2d 795 (5th Cir. 1971) 7

Yates v. State, 509 S.W.2d 600 (Tex.Crim. 1974) 1

OTHER AUTHORITIES

4 Wigmore, Evidence Section 1071 4

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

* * *

No. 74-198

SAMUEL DEWEY YATES,

Petitioner

v.

STATE OF TEXAS,

Respondent

* * *

On Petition for Writ of Certiorari
To The Court of Criminal Appeals
of Texas

* * *

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas delivered on May 22, 1974, is reported in Yates v. State, 509 S.W. 2nd 600 (Tex.crim.1974) and also appears in the appendix to Petitioner's petition for Writ of Certiorari. Petitioner's leave to file Motion for Rehearing was denied on June 12, 1974.

JURISDICTION

Formal jurisdictional requisites of the petition and its timely filing appear to be satisfied although Respondent disputes Petitioner's contention that any rights guaranteed by the Constitution of the United States have been denied.

QUESTIONS PRESENTED

1. Whether taped conversations between Petitioner and the deceased were admissible as probative evidence.

2. Whether the admission into evidence of taped conversations between Petitioner and deceased was a violation of Petitioner's Sixth Amendment right to confrontation and cross-examination.

3. Whether by failing to properly object at trial Petioner waived review of the admission of taped conversations between Petitioner and the deceased as a violation of Petitioner's Sixth Amendment right to confrontation.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner contends that the Sixth Amendment and Section 1 of the Fourteenth Amendment to the United States Constitution are involved here.

STATEMENT OF THE CASE

Petitioner was indicted in the District Court

of Taylor County for murder with malice in the death of his wife, Mildred Irene Yates. Petitioner was tried before a jury; and, after a finding of guilt, was sentenced to life imprisonment.

At the trial of his case, the State was allowed to place into evidence two telephone conversations between Petitioner and Mildred Irene Yates, which Petitioner had taped some ten months before the homicide. (S.F. 757).

Petitioner objected to the admission of the taped conversations claiming that they were irrelevant and were hearsay. He failed to raise the constitutional issue presented here. (S.F. 757, 779). Moreover, counsel only raised the general objection referred to above (S.F. 779), and did not object to specific portions of the taped conversations. The court overruled the objection and allowed the tapes to be played before the jury.

The constitutional issue of a right to confrontation was first raised in the Texas Court of Criminal Appeals. The opinion of the Court of Criminal Appeals does not mention Petitioner's argument on the constitutional question. Petitioner filed a Motion for Leave to File Rehearing in which he specifically raised the constitutional question for the first time, but the Court of Criminal Appeals of the State of Texas denied the Motion without comment.

ARGUMENT AND AUTHORITIES

1. Clearly the tapes contained evidence admissible in this case.

It is clear that the objection of irrelevancy

is without merit. The tapes contained the following exchange between Petitioner and the deceased:

> MILDRED YATES: Well, you already gave yourself something that I can't give you. As I told you yesterday evening you had to earn it. You've got the kids where they are afraid of you because you kicked me around. You grabbed the gun every time you get mad and do things like that until they are frightened for you to even come out here."
>
> SAM YATES: Don't you realize that you are an alarmist? You have put that fear in them. That they come off over there to what you call it that night?" (S.F. 999,1000).

The issue of self-defense was raised in this case at trial, and there was a real question as to who the aggressor was on the night in question. (S.F. p. 46-47). The above quoted statement was clearly relevant to that issue.

Moreover, the evidence was admissible over the hearsay objection because Defendant failed to deny his wife's account of his blandishments. The statement is thus admissible against him as an admission by conduct. Texas General Indemnity Co. v. Scott, 253 S.W. 2d 651 (Tex.Sup. 1953). See also 4 Wigmore, Evidence Section 1071.

A second conversation admissible under the same principles as the colloquy above was as follows:

> MILDRED YATES: Yeah, we would have be-

cause we got that far already. I don't intend to live with a man that is gonna hit me. He is not no man if he hits a woman."

SAM YATES: Well, Shug, that only time I ever hit you was when you got in the way and got hysterical and started pawing at me, or-."

MILDRED YATES: I got hysterical and got in the way. What kind of a person does this kind of thing, Sam?"

SAM YATES: Well, even a rat will fight if he is cornered."

MILDRED YATES: Oh, don't be funny."

SAM YATES: That's right."
(S.F. 1010,1011)

In addition to being admissible under the admission by conduct exception mentioned above, the tapes were admissible in order to impeach the Defendant's prior testimony. Texas General Indemnity Co. v. Scott, supra. Defendant had testified as follows:

QUESTION: Now, in the course of any of the arguments that you ever had, we have heard some testimony that, I believe from your son, Gary, that at the time Mickey would start arguing and get in these things that you would just leave; is that correct?

ANSWER: Often I would try to leave or walk off from an argument with her. It was difficult, but sometimes this was the only way that I could handle it." (S.F. 591)

With this statement, Petitioner left the impression that his way of handling heated arguments was to walk away from them. A rather different impression is left when one listens to the above quoted portions of the tape.

2. The admission into evidence of taped conversations between Petitioner and deceased was not a violation of Petitioner's Sixth Amendment right to confrontation and cross-examination.

While the confrontation clause and the hearsay rule are not coextensive, they are generally designed to protect similar values. California V. Green, 399 U.S. 149, 155 (1970). Both are designed to protect the accused by affording him the opportunity for cross-examination and by enabling the trier of facts to observe the witness's demeanor as an aid in evaluating his or her credibility and making false accusation more unlikely because of the presence of the accused. See Barber v. Page, 390 U.S. 719 (1968); Pointer v. Texas, 380 U.S. 400 (1965).

The lack of cross-examination and the lack of presence of the witness at trial is not per se a denial of confrontation. The necessity for these safeguards is obivated to the degree that the testimony itself is intrinsivally reliable. Where tes-

timony has been found to be intrinsically reliable, this Court and other federal courts have found no denial of the right of confrontation despite the lack of cross-examination and physical presence of the witness. Mattox v. United States, 156 U.S. 237 (1895), (dying declarations); Delaney v. United States, 263 U.S. 586 (1924), (declarations of a co-conspirator); Reed v. Beto, 343 F.2d 723 (5th Cir. 1965), (public records); United States v. Lipscomb, 435 F.2d 795 (5th Cir. 1971), (entries in the regular course of business).

The need for cross-examination in the instant case was relatively minimal because the testimony was intrinsically reliable. By his conduct in the conversations with the deceased it is clear that Petitioner was admitting the truth of Mrs. Yates' accusations. Petitioner's admission by his conduct gives Mrs. Yates' testimony a degree of reliability equivalent to that accorded to dying declarations. See Mattox, supra.

The need to have the witness physically present in order to judge her credibility in the instant case was minimal, first, because of the previously mentioned reliability of her testimony, and second, because the conversation was recorded. This latter circumstance enabled the jury to listen to the intonations of both parties during their discussions and was a great benefit to the jury in judging the witnesses credibility. It was a benefit that has not been present even in cases where the court has ruled that hearsay is admissible over the confrontation clause, and is thus an additional counterweight on the side of admissibility.

3. Whatever objection Petitioner had based on constitutional grounds was waived by his failure to raise it in the trial court.

In Henry v. Mississippi, 379 U.S. 443 (1965), this court held that a state rule requiring immediate objection to admission of evidence served a legitimate state interest and thus could be a ground for refusal to review. In the present case, Petitioner failed to properly object to the admission of the taped conversations. In so doing, he ran afoul of a Texas rule on the admission of evidence; a rule which serves a legitimate state interest. Therefore, Petitioner's failure to properly object bars review under the Henry analysis.

Under Texas law, a general objection to evidence as a whole which does not point out specifically the portion objected to is properly overruled if any part of the evidence is admissible. Brown & Root v. Haddad, 180 S.W. 2d 339 (Tex. Sup. 1944); Eubanks v. Winn, 469 S.W. 2d 292 (Tex. Civ. App. writ ref'd. nre 1970). In this case, only general relevancy and hearsay objections were made and many parts of the taped conversations were admissible.

Texas has a legitimate state interest in following the rule of Brown & Root v. Haddad, supra. The rule has a dual purpose in that it affords the other side an opportunity to avoid error and the necessity for a new trial. To review the constitutionality of the admission of these tapes

at this point in the proceedings subverts the legitimate state interest in the efficient conduct of its criminal trials.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant Attorney General

JOE B. DIBRELL
Assistant Attorney General
Chief, Enforcement Division

DUNKLIN SULLIVAN
Assistant Attorney General

Attorneys for Respondent

P.O. Box 12548, Capitol Station
Austin, Texas 78711

PROOF OF SERVICE

I hereby certify that on _____, I mailed copies of Respondent's Brief In Opposition to William Lowe Burke, Jr., Attorney for Petitioner, P.O. Box 769, Abilene, Texas 79604.

_____
DUNKLIN SULLIVAN
Assistant Attorney General

CERTIORARI DENIED